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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 122

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1377, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 70-81) is reported at 330 F. 2d 242. The Board's Decision and Order are reported at 140 NLRB 56.

JURISDICTION

The decision and decree of the court of appeals were entered on April 9, 1964 (Pet. 70, 84). The

petition for a writ of certiorari was filed on May 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner violated Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act by causing the employer to discharge seven employees for reasons other than failure to tender uniformly required dues.

2. Whether the Board's unfair labor practice findings were based on events occurring more than six months before the filing of the unfair labor practice charge, contrary to Section 10(b) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in an Appendix to the petition (Pet. 64).

STATEMENT

A. The Board's Findings of Fact

Since 1944, when petitioner Union became the recognized bargaining representative of the production and maintenance employees at the Leece-Neville Company's Cleveland, Ohio, plant, petitioner's collective bargaining agreement with the Company has contained a union-security clause which provides that "it is a condition of employment that all employees * * *

shall become and remain * * * members in good standing of the Union" (J.A. 9a, 28a-29a; 52a 259a).[1] The Union traditionally followed a very lenient policy under this clause towards members delinquent in paying their dues, allowing a minimum grace period of at least three months before suspending a member for nonpayment (J.A. 8a-10a; 279a, 281a, 282a).

The Union's by-laws fixed the monthly dues at $4, but allowed a $1 "refund of dues" to members who attended the Union's monthly meeting (J.A. 4a-5a, 31a; 59a, 257a).[2] For a time, the Union allowed attending members to reduce their monthly dues payments by $1 (J.A. 68a-69a, 83a, 84a-85a, 138a). However, by early 1958, the Union had begun to effect the refund by handing a dollar bill to each member who attended a monthly meeting as he or she left the meeting hall (J.A. 70a-71a, 200a).

The seven employees here involved (hereafter "the complainants")[3] were all members of a dissident group. In 1957, after an unsuccessful attempt to force a new election of union officers, the dissidents formed a rival organization (Electrical Workers Alliance, Inc.), withdrew their checkoff authorizations

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[1] "J.A." refers to the joint appendix to the parties' briefs filed in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The refund provision was dropped in November 1959, and since then the Union has required dues of $4 from all members (J.A. 5a, 31a; 59a).

[3] Edward Clark, Anton Draganic, Joseph Dudash, Mary Jaksic, Betty Sipos, Anna Tomko, and Louise Yomnick.

in favor of petitioner, and elected to submit their dues to the Union through their own collector (J.A. 10a-11a; 71a, 86a-87a, 119a-120a, 137a-138a).

On May 15, 1958, employee Josephine Sturtz, as collector, sent the Union a check for $50.60 representing May dues for 14 employees and a per capita tax for 2 others. A covering letter listed the employees for whom payment was being made and the contribution of each to the total sum remitted (J.A. 32a; 62a-64a, 262a). In accordance with the rule that only employees who did not attend Union meetings were required to pay $4, seven of the employees submitted dues of $4, while the remaining seven remitted dues of $3 (J.A. 63a-64a, 67a-70a, 76a-77a, 83a, 84a-85a, 138a, 262a). The Union's chief steward returned the check to Sturtz stating that he would not accept the group remittance (J.A. 32a; 64a). Sturtz then obtained individual bank money orders and submitted them in place of the group check (J.A. 32a; 64a-67a, 263a-270a). The Union accepted those made out for $4, but returned to Sturtz those made out for $3 on the ground that "Union dues were $4.00. If [they] wanted the $1.00 [they] would have to take it at the door" (J.A. 5a, 32a; 70a). Employees Jaksic and Sipos, two of the seven complainants, were among those whose dues tenders of $3 for May were rejected (J.A. 5a, 32a; 62a, 262a, 264, 265a).

In July and August 1958, employee Rose Brodnik, replacing Sturtz as collector, sent the Union five money orders totaling $224, which represented July and August dues for a number of employees whose

names and contributions were itemized (J.A. 5a, 32a-33a; 86a-94a, 272a, 274a-275a, 291a-295a). These submissions included July dues of $4 for employees Jaksic and Sipos, and July and August dues of $4 for the five other complainants (J.A. 5a; 272a, 274a, 275a). The Union returned the money orders to Brodnik, stating in covering letters that it could not accept the tenders of $4 because they were commingled with tenders of dues for other employees in the amount of $3 (J.A. 5a, 32a; 106a, 271a, 273a).

Thereafter, for a period of over two and a half years, the complainants made monthly payments in the amount of $4. As of May 1, 1961, six of the complainants had paid through March 1961,[4] while the remaining complainant, Dudash, had paid through February 1961 (J.A. 5a, 8a, 11a, 33a-34a; 117a, 150a, 155a, 162a-163a, 173a-174a, 177a). All of these payments were accepted by the Union but were applied to the earliest months for which petitioner's records showed no payment (J.A. 5a, 11a; 117a, 136a, 150a, 155a-156a, 162a-163a, 173a-174a, 177a). Accordingly, on May 1, 1961, the Union's books showed that all of the complainants, except Dudash, were in arrears in payment of their dues for the months of February, March, and April 1961, while Dudash was shown to be in arrears for these months and the month of January 1961 as well (J.A. 5a).[5]

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[4] These employees had also given their April dues to their collector, but she had not yet turned them over to the Union (J.A. 158a, 165a).

[5] The dues for May 1961 were not due until Friday, May 5, as the Union had announced in a notice to members that dues were due "the first Friday of each month" (J.A. 8a; 280a).

On May 2, 1961, the Union sent the Company individual letters demanding the discharge of each of the seven complainants on the ground that each was no longer a member in good standing (J.A. 4a, 28a-29a, 34a; 208a-210a, 331a-332a). Although the complainants advised the Company that they had regularly paid their dues and that petitioner had rejected tenders for two months in 1958, all seven were discharged the next day (J.A. 4a, 13a; 129a, 136a-137a, 149a, 157a, 164a, 174a, 180a).

On May 4, the seven complainants went to petitioner's office and paid the amounts which petitioner claimed they owed, plus a reinstatement fee of $1 and the dues for May (J.A. 35a; 123a-124a, 140a, 150a, 158a, 169a-170a, 175a, 180a-181a). After making these payments, the complainants approached the Company and the Union about the possibility of being reinstated (J.A. 124a-126a, 142a-143a, 161a, 170a, 182a, 225a). The Company took the position that the complainants could be rehired only as new employees and, further, that they could be rehired only after employees who had been laid off for economic reasons had been recalled (J.A. 128a, 225a). A few days after the complainants made their payments, the Union's business agent, Zicarelli, requested the Company to rehire them but said nothing about restoring them to their former positions or seniority (J.A. 15a-16a, 35a; 126a, 211a, 214a). In December 1961, all seven were rehired as new employees without credit for previous service (J.A. 16a, 35a; 118a).

B. The Board's Conclusions and Order

Upon the above facts, the Board (two members dissenting) concluded (J.A. 4a-12a, 17a) that the Union violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by causing the Company to discharge the seven complainants for reasons other than failure to tender uniformly required dues. In reaching this conclusion, the Board found that the $1 refund of dues to members who attended the Union's monthly meeting operated against nonattending members as a "charge for nonattendance" which could not be required of them as a condition of employment;[6] hence, the complainants were not delinquent for the months in which a tender of $3 had been improperly rejected and accordingly were not delinquent beyond petitioner's 3-month grace period when their discharge was requested (J.A. 7a-8a).[7]

The Board's order, *inter alia* (J.A. 17a-20a), directs the Union to cease and desist from the unfair labor practices found, and from in any other manner infringing upon the rights guaranteed to employees under Section 7 of the Act. Affirmatively, the order requires the Union to notify the Company and the

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[6] In this respect the Board disagreed with the Trial Examiner who concluded (J.A. 35a-36a) that the $1 "refund" of dues operated as a reward for attendance of union meetings, rather than as a charge for nonattendance.

[7] The Board further concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging the seven employees upon the Union's demand (J.A. 12a-14a, 16a-17a). The court of appeals reversed this finding, and it is not in issue now.

complainants that it has no objection to their full reinstatement; to make the complainants whole for any loss of pay they may have suffered by reason of the discrimination against them; and to post an appropriate notice.

C. The Court of Appeals Decision

The court of appeals found that the Board's unfair labor practice finding as to the Union was supported by substantial evidence and enforced the order against it (Pet. 74-79). However, the court, concluding that the evidence was insufficient to show that the Company was aware of the impropriety of the Union's discharge request, denied enforcement of the Board's order against the Company (Pet. 79-81).

ARGUMENT

1. In the sole exception to the general rule that an employee may not be discharged for nonmembership in a union, Congress, by the terms of the proviso to Section 8(a)(3) of the Act, has permitted an employer and a union, in certain circumstances, to enter into an agreement requiring employees, as a condition of continued employment, to become and remain members of the union. However, in creating this exception, Congress has carefully narrowed the circumstances in which a union lawfully may invoke a union-security agreement to cause the discharge of an employee. Thus, under Section 8(b)(2), a union may demand an employee's discharge under such an agreement only for "failure to tender the periodic

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." A demand for discharge for some other reason, or to enforce any other obligation of union membership, exceeds the protection of the union-security proviso to Section 8(a)(3), and thus falls under the ban of Section 8(b)(2). *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 41-42.

In the Board's view, that was the situation here. Petitioner caused the discharge of the seven complainants under its union-security agreement with the Company, though none of them was delinquent in the payment of dues beyond the 3-month grace period customarily allowed. The principal issue raised by the petition is whether, as the court below held, the Board's finding in this respect is supported by substantial evidence. Such an issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, there is ample support in the record for the Board's findings. As shown *supra*, p. 3, until November 1959, the Union's bylaws set the dues nominally at $4, but provided a refund of $1 for employees who attended the monthly meeting. Since the fourth dollar was charged only those employees who failed to attend the union meeting,[*] the Board reasonably concluded that, despite the "dues"

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[*] Indeed, at first employees who attended the meeting could deduct $1 and remit only $3; later they had to remit $4 and were refunded $1 at the meeting.

label, it was not "periodic dues * * * uniformly required as a condition of * * * retaining membership", but, rather, a penalty for nonattendance of meetings which could not be required of employees as a condition of continued employment.[9] Thus, in May, July and August 1958, complainants' tenders of dues were improperly rejected on the ground that $3 was not enough or that there was a commingling of $3 and $4 tenders. And, consequently, on May 2, 1961, when

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[9] See *Electric Auto-Lite Company*, 92 NLRB 1073, enforced, 196 F. 2d 500 (C.A. 6), certiorari denied, 344 U.S. 823; *National Labor Relations Board* v. *Spector Freight System*, 273 F. 2d 272, 278 (C.A. 8), certiorari denied, 362 U.S. 962; *National Labor Relations Board* v. *Food Fair Stores*, 307 F. 2d 3, 11 (C.A. 3).

National Labor Relations Board v. *Bakery & Confectionery Workers*, 245 F. 2d 211 (C.A. 3), cited by petitioner (Pet. 20, 34-35), is distinguishable. There, the union's practice of allowing a reasonable discount for early payment of dues was held to be permissible. However, such a discount is different from the rebate here, for it was available to every member of the union without his having to perform any union obligation in addition to the dues obligation; *i.e.*, the discount merely induced employees to perform the latter obligation more promptly.

Contrary to petitioner (Pet. 17-19), the Board's conclusion that the fourth dollar was a penalty for failing to attend the union meeting does not limit a union's right, under Section 8(b)(1)(A), to prescribe its own rules with respect to the acquisition or retention of union membership. As the court below noted (Pet. 76), "a union may fine its members for refusing to attend meetings but [quoting *National Labor Relations Board* v. *Spector Freight System, Inc., supra*] '. . . the internal rules of a labor organization, designed to control its members, such as imposition of fines for failure to attend meetings, special assessments, and other penalties, not being 'periodic dues,' may not be enforced by the union by a threat of loss of employment . . . .'"

the Union demanded their discharge, none of the complainants was in arrears in dues beyond the customary 3-month grace period.[10] Against a background of extreme leniency towards dues delinquent members, the sudden action with respect to complainants, all members of the dissident group, whose dues had been accepted for some 30 months following rejection of the 1958 tenders, amply justified the Board in concluding that petitioner demanded their discharge for reasons other than failure to tender uniformly required dues.

2. There is no substance to petitioner's contention (Pet. 24-27) that the finding of an unfair labor practice in this case was barred by Section 10(b) of the Act. That section provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Contrary to petitioner's assumption, the imposition of a fine for nonattendance was not an unfair labor practice by itself. As pointed out *supra*, p. 10 n. 9, a union may lawfully impose a charge or fine for failure to attend meetings; but it commits an unfair labor practice only when it seeks to enforce that fine by causing an employee to be discharged. Petitioner's demand for

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[10] Petitioner's contention (Pet. 21-22) that the grace period was only 21 days is negated by the record. Although the International constitution (J.A. 260a) prescribed a grace period of 21 days, it also provided that a local union could extend the period. Consistent with the express terms of this provision, petitioner "extended" the grace period, always considering it to be at least 3 months (J.A. 9a-10a; 279a, 281a, 282a).

complainants' discharge did not occur until May 1961, which was well within six months of the filing of the unfair labor practice charges. It was thus permissible for the Board to look to such earlier events as the imposition of the fine and the rejection of tenders, for they shed light on the true character of the events occurring within the 10(b) period.

CONCLUSION

For the reasons stated, this petition for certiorari should be denied.

Respectfully submitted,

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